No. 15,492

United States Court of Appeals

For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE, HORACE A. CARDINALE and FRANK J. CARDINALE, Minors, by Frances Cardinale, Their Guardian Ad Litem,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Respondent.

Appeal from the United States District Court for the Northern District of California, Southern Division, in Admiralty.

CLOSING BRIEF FOR LIBELANTS-APPELLANTS.

MORGAN & BEAUZAY,
28 North First Street,
San Jose 13, California,

MORTON L. SILVERS,
870 Market Street,
San Francisco 2, California,

Proctors for Libelants-Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

No. 15,492

United States Court of Appeals

For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE, HORACE A. CARDINALE and FRANK J. CARDINALE, Minors, by Frances Cardinale, Their Guardian Ad Litem,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Respondent.

Appeal from the United States District Court for the Northern District of California, Southern Division, in Admiralty.

CLOSING BRIEF FOR LIBELANTS-APPELLANTS.

INTRODUCTION.

As was stated in appellants' opening brief, this appeal is concerned with the District Court's entry of Judgment on Findings of Fact and Conclusions of Law, at a time when appellants were relying on orders of the Court extending the time of appellants to file objections to the proposed Findings and Conclusions. In this closing brief, we will confine ourselves to answering the legal arguments advanced by respondent

in opposition to the legal position taken in our opening brief. It would seem inappropriate to reply to respondent's repeated innuendoes and statements that the requested order nunc pro tunc "was merely and obviously an attempt to get around the appellants' lapsed time of appeal." That is a personalized impugning of motive and is not in any sense a legal argument addressed to issues presented in this appeal.

RESPONDENT'S STATEMENT OF THE CASE.

Appellants are not in agreement with the statement of the case set out in respondent's brief, where it is said that proctors for the respondent "prepared formal findings of fact and conclusions of law in summary of the trial judge's own memorandum opinion." We desire to emphasize that the so-called "findings of fact and conclusions of law" were, in fact, *proposed* findings and conclusions. The essence of our appeal is that the District Court acted improperly in entering judgment on the *proposed* findings and conclusions, before appellants were given the opportunity to be heard in objection thereto.

Their status as *proposed* findings and conclusions is clearly shown by the orders entered by the District Court on January 19, 1956, and February 14, 1956 (T.R., pp. 30, 31).

We think it somewhat bold to state that respondent's proposed findings and conclusions were "in summary of the trial judge's own memorandum opinion."

At pages 22 and 23 of appellants' opening brief, we have set out portions from the transcript of record which clearly establish that the proposed findings of respondent did not accurately and completely summarize the trial judge's memorandum opinion.

More importantly, the respondent's statement of facts omits to state that on March 14, 1956, the District Court entered an oral order setting aside the findings of fact and judgment (T.R. pp. 35, 36; appellants' opening brief, pp. 18-19). Respondent appears to have assumed, throughout its brief, that no such order was ever made by the trial Court. The failure of the trial Court to give full effect to its order setting aside the findings and judgment constituted a major point in the brief of appellants. As a consequence of its assumption, respondent appears to have made no effort to meet major points of the argument advanced by appellants.

RESPONDENT'S STATEMENT OF APPELLANTS' ARGUMENT.

At page 4 of their brief, respondent has "properly condensed" the summary of argument advanced by appellants. Just as any litigant, appellants prefer to summarize our own argument in our own manner. We feel that unwarranted mis-statements of our argument have been set out in respondent's condensation. We specifically object to points II and III of respondent's re-statement of our argument. Respondent construes point II of our argument as being that the judgment

was void because "appellants had no opportunity to enter objections to the *judgment on the findings.*" More precisely, this point of our argument was that the judgment was void because appellants had no opportunity to enter objections to the *proposed findings* on which the judgment was based.

Respondent gratuitously rephrased the third point of our argument as being that the trial Court had the duty to enter a written order nunc pro tunc "because he permitted appellants to file objections and heard oral arguments thereon." This, again, appears to be assuming away the entire argument, and constitutes an utter failure to meet our argument. More precisely, point III of our argument could be restated as that the trial Court had the duty to enter a written order nunc pro tunc *because he entered an oral order setting aside the judgment,* which order was never entered on the Record in written form.

REBUTTAL ARGUMENT.

We will now rebut the argument advanced by respondent in the order set forth in its brief.

I. THE TRIAL COURT HAD NO OPPORTUNITY TO EXERCISE JUDICIAL DISCRETION, AS IS CLEARLY SHOWN BY HIS ORDERS GRANTING ADDED TIME TO OBJECT TO THE PROPOSED FINDINGS.

Respondent's brief (pp. 4-5) concedes that a trial judge has the power to correct judgments entered

through mistake or error. Respondent has omitted to discuss the authorities cited by appellants for the proposition that clerical error may be committed by a judge, as well as by a clerk; it is assumed that they are also in accord on this point. Respondent also has failed to answer the proposition that a judgment entered by a clerk without authority is void; it is assumed that they are likewise in accord with this proposition.

Respondent does disagree with appellants' position that the judgment herein was entered through clerical error and inadvertence, and with a lack of judicial discretion. As to this phase of the appeal, the crux of the matter appears to be whether or not there was an exercise of judicial discretion in the entering of the judgment on January 30, 1956.

At page 10 of appellants' opening brief, it was stated that the issue is one of the judge's intent, and that the best evidence is the judge's own statement. Proctors for respondent appear to have misread this quotation, for they say (p. 6) that the judge's statement is "either expressed or implied, *from his orders.*" The quoted matter, set out in appellants' opening brief, reads as follows: ". . . either expressed or implied *from the order of correction.*"

It was pointed out in appellants' opening brief that there is, in this case, no order of correction from which the judge's intent can be gathered. We argued that his intent had been clearly manifested in his granting of the orders of continuance.

In opposition to that argument, respondent's brief states only that the trial judge's intent to give judgment adverse to appellants was made clear by the entry of judgment. Respondent thus seems to have completely ignored the first point of the argument advanced by appellants herein—that the judgment was entered through clerical error and inadvertence, and without the exercise of judicial discretion.

Appellants submit that it *was* the intent of the trial judge to give *judgment* adverse to appellants; this is made clear by his memorandum opinion (T.R. 10). It is earnestly submitted that it is equally clear that it was *not* the trial judge's intent to enter judgment *on the proposed findings* of fact and conclusions of law submitted by respondent.

The attention of this Court is again respectfully directed to the orders of January 19, 1956, and February 14, 1956, wherein the trial Court extended the time of libelants-appellants "within which to file objections to the proposed findings of fact and conclusions of law submitted by respondents."

We can do no more than reiterate what was said at page 7 of appellants' opening brief, wherein we pointed out that the sole apparent purpose in the mind of the Court in granting continuances to enable the entering of objections necessarily must have been to enable the Court to have the benefit of opposing points of view in the exercise of a sound judicial discretion to reach a final determination on the issues. It will be perfectly obvious to this Honorable Court that the entry of such orders would have been a futile act had

it been the intent of the trial judge to enter judgment on the findings proposed by respondent.

Respondent's brief asserts that some of the cases cited by proctors for appellants were found "not to be factually even remotely close to the questions and issues raised in this appeal." We think it a novel view that appellants are required to cite cases which are factually similar. Each and every case cited in appellants' opening brief was cited for a proposition of law. Each and every such proposition of law is very relevant to the case at bar.

Respondent concedes that the case of *Sabine Hardwood Co. v. West Lumber Co.* (D.C., Tex., 1916), 238 Fed. 611, well illustrates the power of the trial judge to correct judgments entered through mistake or error. As was pointed out by respondent, the case held there was a power in the trial judge to correct a mistaken description in the judgment. Inasmuch as such power is conceded to exist, we see no basis for their position that the trial judge does not equally have the power to set aside an entire judgment which was entered through mistake or inadvertence. In the cited case, it was said:

> "But if [the clerk] makes a mistake in the entry, can it be said that the judicial act of the court can be controlled by the ministerial act and mistake of the clerk? Certainly not!"

The relevancy of *Fox v. Smith* (C.C.A., D.C., 1929), 30 Fed. 2d 869, has been made clear by the portions quoted on page 11 of appellants' opening brief.

The balance of respondent's first point is devoted to a discussion of Rule 60, Federal Rules of Civil Procedure, and cases construing that Rule. As was pointed out in appellants' opening brief (p. 10), those rules are not binding in admiralty cases. Even if it should be assumed that such rules are binding, the cases cited by respondent are readily distinguishable.

In the case of *Perrin v. Aluminum Co. of America* (C.C.A. 9, 1952), 197 Fed. 2d 254, it was held that Rule 60(b) was not intended to be resorted to as a means of enlarging by indirection the time for appeal *except in compelling circumstances where justice requires that course.* In the case before this Honorable Court, the appeal is from the entry of judgment which was, obviously and patently, inadvertent, premature, and through mistake. Such was not the case in *Perrin v. Aluminum Co. of America,* supra. The Court said (p. 255):

> "[Appellants] have not shown, nor do they claim, that there has been any mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or misconduct such as might warrant the vacation of a judgment under other provisions of the rule."

Respondent cites *McConville v. United States* (C.C.A. 2, 1952), 197 Fed. 2d 680, in support of its theory that the time granted to appellants herein was somehow extended by the orders of the trial Court granting permission to file objections to the proposed findings of fact and conclusions of law. The case is one construing the Federal Rules of Civil Procedure.

Even if it should be, again, assumed that such rules are binding in admiralty cases, it is respectfully submitted that the differences between the instant case and the *McConville* case are so extensive as to render the principle of the *McConville* case inapplicable here.

Rule 73(a), construed in the *McConville* case, provides in part as follows:

> "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and it is to be computed from the entry of any of the following orders made upon a timely motion under such rules: * * * or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, * * *"

Rule 52(b), in turn, provides that the Court may *amend* its findings upon motion of a party made not later than ten days after entry of judgment. It will be readily apparent to this Honorable Court that what was contemplated by the terms of this section is a situation vastly different from the situation in the instant case, where the trial Court granted its order continuing the time of libelants to enter objections to *proposed* findings of fact and conclusions of law.

II. IT WAS NOT WITHIN THE POWER OF THE TRIAL COURT TO ENTER JUDGMENT ADVERSE TO A PARTY NOT BEFORE THE COURT.

Respondent commences point two of its argument by pointing out that some of the cases cited in appel-

lants' opening brief were not *factually identical* with the case at bar. Once again, we point out that those cases were cited, not for their factual situations, but for principles of law. The gist of those cases was that when a party is not before the Court, the entry of judgment against such party would be an act in excess of the Court's jurisdiction. The attention of this Honorable Court is respectfully directed to page 16 of appellants' opening brief, where it was argued that appellants were entitled to rely upon the orders of the trial Court extending their time to submit proposed counter-findings and that the judgment entered prior to the expiration of such time was prematurely entered.

In any event, respondent has not sought to refute the clear holding of *Gregory v. Stetson,* 133 U.S. 579, 10 S.Ct. 422, 33 L.Ed. 792 (p. 14, appellants' opening brief) that a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. There can be no question but that appellants, in reliance on the orders extending their time to enter objections to the proposed findings of fact and conclusions of law, were not before the Court on January 30, 1956, the date upon which judgment was entered.

In the case of *Steccone v. Morse-Starrett Products Co.* (C.C.A. 9, 1951), 191 Fed. 2d 197, the question before this Honorable Court was whether or not a memorandum opinion, unsupported by findings of fact and conclusions of law, constituted a final judgment from which an appeal would lie. It was held that "the

absence of requisite findings of fact is not such a jurisdictional defect as would prevent an appeal."

It would seem almost unnecessary to point out to this Honorable Court that the *Steccone* case involved the complete absence of findings and conclusions, while the instant case involves a judgment made on findings which had been proposed by the respondent herein and to which libelants had no opportunity to object.

Respondent concludes that portion of his argument by quoting Section 634 of the California Code of Civil Procedure, and California cases construing that section. It is respectfully submitted that the entire argument there advanced relates solely to California procedure, and thus is not controlling as to this Court.

Even if it should be assumed that Section 634 of the California Code of Civil Procedure, and the case of *Treat v. Superior Court* (1936), 7 Cal. 2d 636, 62 Pac. 2d 147, were controlling, it is respectfully submitted that the identical relief herein prayed for would be granted to appellants under those rules.

Respondent's brief (pp. 11-12) quotes portions from *Treat v. Superior Court,* supra, purporting to show that a judgment is valid, despite the lack of service of findings of fact and conclusions of law on the opposing party. The attention of this Honorable Court is respectfully directed to the fact that, in the portion quoted in respondent's brief, the Court relied solely on *statutory* authority.

However, in the portion immediately following that quoted in respondent's brief, the holding of the Cali-

Respondent's brief next sets out language from Volume 6 of *Moore's Federal Practice,* purporting to show the uses of nunc pro tunc entries. Inasmuch as that discussion relates to the nunc pro tunc entry of *judgments,* no necessity is seen for our discussing the point. The instant appeal involves the propriety or necessity of entry of an *order* nunc pro tunc.

Respondent's brief apparently has not sought to controvert the rule announced in *Roth v. Marsten,* 110 Cal. App. 2d 249, 242 Pac. 2d 375, to the effect that a court has the plain duty to remedy clerical errors. It is respectfully submitted that the trial Court had not only the power, but also the duty to allow the motion for entry nunc pro tunc of the order setting aside the judgment.

IV. APPELLANTS WERE JEOPARDIZED IN THEIR RIGHTS OF APPEAL BY DENIAL OF THE MOTION NUNC PRO TUNC, SINCE THAT WAS THE ONLY REMEDY AVAILABLE TO APPELLANTS.

The brief for respondent (p. 15) states that "the appellants had ample and generous time in which to file a notice of appeal from the judgment entered in this case." Respondent has not seen fit to enlighten us as to how such an opinion was arrived at.

It is fundamental that an appeal lies to this Honorable Court only from a final judgment or a final determination of the rights of a party. Surely it cannot be said that libelants herein could take a direct appeal from the judgment entered on January 30, *after* the

Court had set aside such findings of fact and judgment. Subsequent to the entry of the trial Court's order setting aside the findings of fact and judgment, there was no judgment of record from which a direct appeal could be had.

At the very least, appellants were compelled to wait until after a judgment had been entered before appeal proceedings could be commenced.

The only remedy then available to libelants-appellants herein was to move for entry of a written order in conformity with the oral order made on March 14, 1956, to make the record speak the truth. It is obvious that appellants were compelled to wait for some time subsequent to March 14, 1956, before appellants became aware that the trial Court had no intention to enter such written order. Thus, a nunc pro tunc entry was the only remedy available to appellants.

The instant case is similar to the case of *In re Wight,* supra, in that the written journal of the Court did not fully and completely reflect the orders of the Court. It is respectfully submitted that, just as was done in that case, so here the trial Court's written record should have been corrected by an order nunc pro tunc to properly show the orders made by the Court.

Respondent's brief (p. 15) next asserts that appellants' opening brief, at pp. 22-28, is devoted to our contention that the findings of fact did not conform to the *evidence.* Reference to p. 22 of appellants' opening brief discloses that the first point there discussed

is that the findings of fact did not conform with the trial Court's *memorandum opinion.* In a similar manner, the second point there discussed does not constitute a contention that the findings of fact did not conform to the evidence. On this point, we argued that the trial Court should have entered a finding as to the duty of a gasoline attendant to exercise care so as not to cause the gasoline to overflow—a question of law.

The remaining points made in that portion of our opening brief (with regard to custom in refueling, rate of flow of gasoline, and point of origin of the fire) were not a contention on the part of appellants that the findings of fact did not correspond to the evidence. Rather, that discussion shows that the trial Court refused to make any such changes in the proposed findings which had theretofore been adopted inadvertently.

It has not been our intent to raise any questions as to weight of the evidence on this appeal. We do maintain that all of those issues should have been considered by the trial Court in the exercise of a sound judicial discretion.

Respondent's brief concludes by stating that this appeal "is directed primarily to the refusal of the trial judge to enter the order nunc pro tunc." This constitutes a failure to recognize that the appeal is equally directed to the question that the entry of judgment was error, for the reason that appellants were not before the Court at the time of such entry, having obtained from the Court its orders extending time within which to object to the proposed findings.

CONCLUSION.

For the above stated reasons, and upon the basis of the authorities hereinabove cited, the appellants respectfully pray that this Honorable Court will reverse the trial Court, and order the entry of the order nunc pro tunc as sought by appellants in the Court below.

Dated, San Jose, California,
September 16, 1957.

Respectfully submitted,
MORGAN & BEAUZAY,
MORTON L. SILVERS,
By LUTHER CLARK,
Proctors for Libelants-Appellants.